Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
STATE WATER RESOURCES CONTROL BOARD AND
STATE OF WASHINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1975
CERTIORARI GRANTED JUNE 23, 1975

IN THE

Supreme Court of the United States

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Petitioners,

—v.—

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
STATE WATER RESOURCES CONTROL BOARD AND
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[1] Under the Federal Water Pollution Control Act original jurisdiction is in the Court of Appeals. 33 U.S.C. (Supp. II) 1369(b)(1)(D). The Court of Appeals' opinion and judgment have been printed as Appendices A and C, respectively, to the Petition for a Writ of Certiorari.

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DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 73-2466, 73-2486, 74-1189 [2]

DATE	FILINGS—PROCEEDINGS

C.A. 9 Docket No. 73-2466:

8/6/73 Filed original and seven copies, Petition to Review an Order of the EPA approving a State permit system.

9/19/73 Filed original and two copies of Certified List of Record in Lieu of Record pursuant to Rule 17(b), FRAP

9/24/73 Received original and four copies of Petitioners request for portions of administrative record., -to- BR. -mo-

9/26/73 Filed Motion and Order (BR) granting petitioner's request for portions of administrative record. Subject to reconsideration in filing of opposition within time fixed by rule

10/9/73 Received portions of the administrative record. Returned for additional copies

10/23/73 Filed 26 Appellants Briefs

11/16/73 Filed four Certified Copies of portions of the Administrative Record (PP. 737 to 802).

1/16/74 Filed typewritten copy of respondent's brief

1/18/74 Filed 25 appellees briefs

3/22/74 Filed as of March 21, 1974, 25 Appellants Reply Briefs. (For State of California) Service 3/5/74

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[2] Those relevant docket entries which are common to more than one of the three docket cards here involved are not repeated below, but are included only under that case to which they relate most directly or under the first case (by docket number) in which they appear.

DATE	FILINGS—PROCEEDINGS

3/22/74 Filed original and seven copies of petitioner's (State of California) motion to augment record; to "C" (from "C" to O'Fallon as of 3/28/74)

5/23/74 Filed order (D & CY) petitioner's motion to augment the record is granted

6/20/74 Filed petitioner's motion to expedite hearing on appeal to (C)

7/15/74 Filed respondents' memorandum concerning motion for expedited hearing

8/15/74 Filed petitioner's People of State of California motion to augment record on petition for review to (panel)

8/22/74 Filed order (W) granting petitioner leave to augment the record

9/10/74 Argued & submitted to: Wright, Choy, CJJ, Burns, DJ

10/15/74 Filed order (Wright) we hereby request that the following items listed in the index to the administrative record in this cause be transmitted to us: Item No. 6, Page 15; Item 7, Page 16; Item 10, Page 265; & Item 23, Page 709

11/14/75 Received from Regional Counsel Dunn various documents requested by Judge Wright (in LPS)

2/13/75 Ordered Opinion (Wright) Filed & Judge to be filed & entered

2/13/75 Filed opinion—Remanded with direction

2/13/75 Filed & Entered Judgment

3/5/75 Filed original and three copies of Opposition to Application for Stay of Mandate to (Wright)

3/5/75 Filed respondent's application for stay pending determination of cert. to (Wright)

DATE	FILINGS—PROCEEDINGS

3/13/75 Recvd. oral directive from Judge Wright to call counsel & advise that app for stay is denied (order as yet not recvd or filed)

3/17/75 Filed order (W, Cy & Burns) denying the stay

3/20/75 Issued Judgment

5/22/75 Recvd. SC notice re: filing pet for cert 5/14/75 SC#74-1435

6/24/75 Filed certified copy of S.C. order (Justice Brennan) staying judgment of Ct of Appeals pending disposition of petition for writ of certiorari. (panel)

7/1/75 Filed certified copy of SC order granting petition for cert 6/23/75 (panel)

C.A. 9 Docket No. 73-2486:

8/9/73 Filed original and seven copies, Petition for Review of an Order of the EPA, pertaining to a state permit program submitted to the EPA by the governor, pursuant to § 402(b) of the Federal Water Pollution Control Act, etc.

9/19/73 Filed original and three copies of certified list of record in lieu of record pursuant to Rule 17(b). FRAP

10/29/73 Filed 25 appellants briefs

12/21/73 Filed original and three respondent's motion to consolidate appeal with 73-2466 to C

1/2/74 Filed Order (C) granting respondent's leave to consolidate appeal with 73-2466

3/22/74 Filed 25 appellants reply briefs (For State of Washington) Service 3/21/74

C.A. 9 Dockets No. 74-1189:

2/4/74 Filed original and nine copies of a petition to review an order of the Environmental Protection Agency

DATE	FILINGS—PROCEEDINGS

5/9/74 Filed respondents' motion for consolidation of case with 73-2486 as the record in this case and to supplement the record; (to O'Fallon)

5/23/74 Filed Order (Duniway & Choy) granting leave to consolidate appeal with 73-2486. The letter of Nov. 14, 1973 from Russell E. Train to the Hon. Daniel J. Evans will be added to the record in 73-2486, which will be the record for the consolidated proceeding.

9/9/74 Rec'd. 25 Amicus briefs (Commonwealth of Pennsylvania to panel

9/9/74 Filed Commonwealth of Pennsylvania's motion for leave to file late amicus brief to (panel)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

M/S #509

Jun. 12, 1973

[Jul. 14, '75, 2:50 PM, Land and Natural Resources Division, Department of Justice]

Mr. John A. Biggs
Director, Department of Ecology
State of Washington
P.O. Box 829
Olympia, Washington 98101

Dear Mr. Biggs:

I was pleased to receive your letter of June 5 indicating that you plan shortly to forward the formal application for the State of Washington to participate in the National Pollutant Discharge Elimination System (NPDES) program. I believe that the working relationship which has been underway between EPA's staff and yours in clarifying certain portions of the required submission have been quite fruitful.

With respect to the first area of concern discussed in your letter, Region X staff are prepared to discuss an understanding with the State of Washington relevant to waiver of EPA veto authority similar to that granted the State of California. We do see the need for the State to provide a listing or quantification by category of the entities for which you feel a waiver of veto would be appropriate. National EPA policy dictates that we will not consider waiver of EPA review for (1) discharges which may affect the state other than the one the discharge is in, (2) discharges into the ocean, or (3) discharges which contain toxic substances in toxic amounts. Any such waiver agreement that is reached in this point in time will be subject to evaluation as the State gains experience in implementing the permit pro-

gram. If that experience shows that additional areas of waiver would be appropriate, larger waiver provisions could be incorporated at a later time.

Region X agrees with your philosophy that if the State assumes responsibility for the permit program, it is somewhat incongruous that such responsibility does not include issuance of permits for Federal facilities. However, because of Federal policy with regard to Federal-State regulationships and as translated into the EPA permit regulations published May 22, 1973, EPA does not have the prerogative to delegate permit issuance for Federal facilities to any state. It is our understanding that this Federal philosophy may well be subject to challenge in the courts by interested states. Region X does, however, intend to pursue a closely cooperative relationship with the states as permit requirements are developed by EPA for Federal facilities.

I am asking Mr. Lyman Nielson, Director, Washington Operations Office, to be available at your request to assist the State in completing the formal submission requesting approval for Washington's permit program.

Sincerely,

James L. Agee
Regional Administrator

cc: Lyman Nielson

Ted Rogowski)
) 6-13-73
L. H. Miller)

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

[SEAL]

Jul. 20, 1973

Reply to Attn. of: M/S 509

Honorable Daniel J. Evans
Governor of Washington
State Capitol
Olympia, Washington 98504

Dear Governor Evans:

Thank you for your letter of June 21, 1973, in which you requested approval for Washington to participate in the national permit system established by the 1972 amendments to the Federal Water Pollution Control Act.

We have reviewed the material submitted to us and find that it is missing important components. I have personally spoken with Mr. John Biggs, Director of the State of Washington Department of Ecology, and have informed him of our decision. Members of my staff will be meeting with members of Mr. Biggs' staff to discuss our concerns in the near future. In addition, I will be sending a detailed analysis of the submission to the Department of Ecology and the Thermal Power Plant Site Evaluation Council.

Within the next few weeks we will be initiating the issuance of permits under the National Pollutant Discharge Elimination System. We hope to have the joint sponsorship of the State of Washington for our actions on those permits so that we might continue to work closely on the issuance of permits.

We will continue to work closely with the State so that our efforts will lead to approval of the National

Pollutant Discharge Elimination System operated by the State of Washington.

Sincerely,

/s/ James L. Agee
JAMES L. AGEE
Regional Administrator

cc: John A. Biggs
Joseph F. Lightfoot

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

[SEAL]

Jul. 20, 1973

Reply to Attn. of: M/S 509

Mr. John A. Biggs, Director
Department of Ecology
State of Washington
Post Office Box 829
Olympia, Washington 98501

Dear Mr. Biggs:

The State of Washington's request to participate in the National Pollutant Discharge Elimination System (NPDES) permit program has been analyzed by my staff and by the Headquarters staff of EPA. As the enclosed letter to Governor Evans indicates, we have determined that the Attorney General's Statement and the program description are missing important components. Consequently, the formal 90-day review period has not begun.

I have attached a detailed statement of our requested changes. My staff is ready to assist you or your staff to clarify or explain the comments contained in our attachment. We plan to have a meeting with members of your staff this coming Tuesday, July 24, in Olympia.

Sincerely,

/s/ James L. Agee
JAMES L. AGEE
Regional Administrator

2 Enclosures

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

[SEAL]

Jul. 20, 1973

Reply to Attn. of: M/S 509

Mr. Joseph F. Lightfoot
Executive Secretary
Thermal Power Plant Site
Evaluation Council
820 East 5th Avenue
Olympia, Washington 98504

Dear Mr. Lightfoot:

The State of Washington's request to participate in the National Pollutant Discharge Elimination System (NPDES) permit program has been analyzed by my staff and by the Headquarters staff of EPA. As the enclosed letter to Governor Evans indicates, we have determined that the Attorney General's Statement and the program description are missing important components. Consequently, the formal 90-day review period has not begun.

I have attached a detailed statement of our requested changes. My staff is ready to assist you or your staff to clarify or explain the comments contained in our attachment. Please contact me if you wish to arrange for additional information or assistance.

Sincerely,

/s/ James L. Agee
JAMES L. AGEE
Regional Administrator

2 Enclosures

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

[Rec'd, U.S. Attorney, San Francisco, Calif. Refer to _____]

Aug. 7, 1973, 1:35 PM

PEOPLE OF THE STATE OF CALIFORNIA ex rel.
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
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San Francisco, CA 94102
Telephone: 557-3920

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER,

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS.

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

Petitioner hereby alleges:

I

ACTION AND JURISDICTION

1. This is an application for review of the action of the ENVIRONMENTAL PROTECTION AGENCY and ROBERT W. FRI, its Acting Administrator, in approving a state permit system pursuant to Section 402 [33 U.S.C. § 1342] of the Federal Water Pollution Control Act Amendments of 1972 [86 Stats. 816 et seq.; 33 U.S.C. § 1251 et seq.].

2. The jurisdiction of this Court is invoked pursuant to Section 509(b)(1)(D) [33 U.S.C. § 1369(b)(1)(D)] of the Federal Water Pollution Control Act Amendments of 1972.

VENUE

3. Venue in this action is based upon residence by Petitioner People of the State of California within the jurisdiction of the Ninth Circuit Court of Appeals of the United States, under Section 509(b)(1)(F) [33

U.S.C. § 1369(b)(1)(F)] of the Federal Water Pollution Control Act Amendments of 1972.

II.

PARTIES

4. Petitioner herein is the PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Water Resources Control Board.

5. The State Water Resources Control Board (the "State Board") is a public agency of the State of California duly created by the Legislature of the State of California, and consists of five members appointed by the Governor of the State of California. The State Board, pursuant to California Water Code section 13001, is a principal state agency with primary responsibility for the coordination and control of water quality. Pursuant to California Water Code section 13160, the State Board is the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act Amendments of 1972.

6. Respondent ENVIRONMENTAL PROTECTION AGENCY is an agency of the United States of America. Respondent ROBERT W. FRI is the Acting Administrator of said agency. As acting administrator, said FRI is charged with the duty and responsibility of administering the Federal Water Pollution Control Act Amendments of 1972 by Section 101(d) [33 U.S.C. § 1251(d)] of said amendments.

III.

STATUTORY PROVISIONS

7. The Federal Water Pollution Control Act Amendments of 1972 (the "Act") were passed by the Congress of the United States on October 18, 1972, over the veto of the President of the United States .

8. Section 101(a) [33 U.S.C. §1251(a)] of the Act states that "[t]he objective of the Act is to restore and

maintain the chemical, physical, and biological integrity of the Nation's waters."

9. Section 101(b) [33 U.S.C. §1251(b)] of the Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act."

10. Section 402 [33 U.S.C. § 1342] of the Act establishes a National Pollutant Discharge Elimination System (NPDES). The NPDES allows the Administrator to issue permits for the discharge into navigable waters of any pollutant or combination of pollutants, so long as the proposed discharge meets the requirements of the Act. Except in compliance with such a permit, the discharge of any pollutant by any person is made unlawful by Section 301 [33 U.S.C. § 1311] of the Act.

11. Section 402 [33 U.S.C. § 1342] of the Act further provides that each state which desires to administer its own permit system under the NPDES for discharges of pollutants into navigable waters within its jurisdiction, may submit to the Administrator a full and complete description of the program which it proposes to administer under state law. Section 402 provides that the Administrator "shall approve each such submitted program" which meets the requirements specified by the Act for such a program.

12. Under Section 313 [33 U.S.C. § 1323] of the Act, each department, agency or instrumentality of the executive, legislative and judicial branches of the Federal Government which has jurisdiction over any property or facility or is engaged in any activity resulting or which may result in the discharge of pollutants, must comply with Federal, State, interstate and local requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements, including the payments of reasonable service charges.

IV.

THE ADMINISTRATOR'S ACTIONS

13. Pursuant to Section 304(h)(2) [33 U.S.C. § 1314(h)(2)] of the Act, the Administrator was required to promulgate guidelines establishing the minimum elements necessary for a State to assume operation of the NPDES within its jurisdiction. The Administrator has promulgated such guidelines, and has caused them to be published at 37 Federal Register 28390 (December 22, 1972) and at 40 Code of Federal Regulations §§ 124.1-124.94.

14. The Governor of the State of California, pursuant to Section 402(b) [33 U.S.C. § 1342(b)] of the Act, submitted to the Administrator on February 15, 1973, a full and complete description of the program which the State proposed to operate within its jurisdiction as part of the NPDES. Said program was in compliance with the guidelines promulgated by the Administrator (40 C.F.R. §§ 124.1-124.94). Additional supplemental information concerning the proposed program was submitted to the Administrator on April 10, 1973.

15. By letter dated May 14, 1973, the Administrator purportedly approved the program heretofore described, and authorized the operation of the program proposed by the Governor. Pursuant to Section 402(c)(1) [33 U.S.C. § 1342(1)] of the Act, the Administrator purportedly suspended the issuance of permits by him under Section 402(a) [33 U.S.C. § 1342(a)] of the Act. The Administrator did not, however, suspend the issuance of permits by him for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal Government." A copy of said letter is attached hereto as Exhibit "A" and is incorporated herein as if set forth in full.

V.

UNLAWFUL ACTS BY THE ADMINISTRATOR

16. The failure of the Administrator to suspend the issuance of permits by him for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal government" and, correlatively, the failure of the Administrator to approve the California permit program heretofore described insofar as it applies to agencies and instrumentalities of the Federal government, violates the limitations imposed upon his authority by the Act, and more particularly by Sections 402 and 313 of the Act [33 U.S.C §§ 1342 and 1323].

VI.

INJURY

17. By failing to suspend the issuance of permits for discharges into navigable waters "from agencies and instrumentalities of the Federal government" and, correlatively, by failing to approve the California permit program insofar as it applies to agencies and instrumentalities of the Federal government, the Administrator has prevented the State Water Resources Control Board, acting on behalf of the People of the State of California, from exercising its right and responsibility under Section 101(b) [33 U.S.C. § 1251(b)] of the Act, to "prevent, reduce, and eliminate pollution" and to "plan the development and use (including restoration, preservation and enhancement) of land and water resources" to the extent required by the Federal Water Pollution Control Act Amendments of 1972.

WHEREFORE, petitioner requests that:

1. This Honorable Court review the action of respondent ENVIRONMENTAL PROTECTION AGENCY and its Acting Administrator ROBERT W. FRI, in failing to suspend the issuance of permits by the Administrator for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal government";

2. This Honorable Court declare that respondent ENVIRONMENTAL PROTECTION AGENCY and its Acting Administrator, ROBERT W. FRI, erred and exceeded their statutory powers by failing to suspend the issuance of permits by the Administrator for discharges into navigable waters within the jurisdiction of California "from agencies and instrumentalities of the Federal government" and, correlatively, by failing to totally approve the proposed permit system heretofore described and submitted by the Governor of the State of California; and

3. This Honorable Court issue such other and further relief as it deems proper.

Dated: August 6, 1973.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the
State of California

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General
RICHARD C. JACOBS
Deputy Attorney General

/s/ Roderick Walston
RODERICK WALSTON
Deputy Attorney General
Attorneys for Petitioner

EXHIBIT "A"

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

[SEAL]

May 14, 1973

THE ADMINISTRATOR

Honorable Ronald Reagan
Governor of California
Sacramento, California 95814

Dear Governor Reagan:

Your request for approval to conduct a State permit program pursuant to the provisions of the National Pollutant Discharge Elimination System under Section 402 of the Federal Water Pollution Control Act Amendments of 1972 (the "Act") is hereby approved. Accordingly, as of this date, I am suspending the issuance of permits by the Environmental Protection Agency under Subsection (2) of Section 402 of the Act as to all discharges in the State of California, other than those from agencies and instrumentalities of the Federal government.

The permit program that you conduct pursuant to this authority must at all times be in accordance with Section 402 of the Act, all guidelines promulgated pursuant to Section 304(h)(2) of the Act, and the agreement between the Regional Administrator of EPA's Region IX and the Chairman of the California Water Resources Control Board, which I have also approved today.

During the period of interim authorization, your State indicated a willingness and ability to comply with both the spirit and the letter of the Act. Based upon this performance during the interim period and the description of the program that you submitted, I am pleased to approve California's permit program.

California is the first State to receive approval of a permit program under this comprehensive new water pollution law. Your State's actions in the past have shown that water quality can be controlled. Both EPA and I

are anxious to aid you in continuing this progress towards the elimination of water pollution.

Sincerely yours,

/s/ Robert W. Fri
ROBERT W. FRI
Acting Administrator

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2486

[Filed Aug. 9, 1973, Dennis R. Mathews, Clerk, U.S. Court of Appeals]

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as Acting Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

SLADE GORTON
Attorney General of the State of Washington

CHARLES B. ROE, JR.
Senior Assistant Attorney General

CHARLES W. LEAN
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as Acting Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS

PETITION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)(1)(D)]

This petition is an application for review of the action of the Environmental Protection Agency, United States of America, and Robert W. Fri, the Acting Administrator of the Environmental Protection Agency, acting through James L. Agee, Regional Director of Region X of the Environmental Protection Agency, in making a determination on July 20, 1973, pertaining to a state permit program submitted to the Environmental Protection Agency by the Governor of the State of Washington on June 21, 1973, pursuant to section 402(b) of the Federal Water Pollution Control Act Amendments of 1972. [86 Stats. 816 et seq.; 33 U.S.C. § 1251 et seq.] In further support and amplification of this application the following is submitted:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction by virtue of section 509 (b) of the Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. 1369(b)].

2. Venue is based upon residence by petitioners within the jurisdiction of the Ninth Circuit Court of Appeals of the United States, under Section 509(b)(1)(F) [33 U.S.C. § 1369(b)(1)(F)] of the Federal Water Pollution Control Act Amendments of 1972.

II.

PARTIES

3. (a) Petitioner, State of Washington, is a sovereign state of the United States.

(b) Petitioner, Department of Ecology, is an agency of the State of Washington created by the state's legislature by Chapter 43.21A of the Revised Code of Washington (RCW). The Department of Ecology is, by Chapter 90.48 RCW, the state agency with primary responsibility for control and protection of the quality of the waters within the State of Washington. RCW 90.48.-260 designates the Department of Ecology as the state water pollution control agency for all purposes of the Federal Water Pollution Control Act ("the Act") as it now exists and authorizes said Department to participate fully in the programs of the Act as well as to take all action necessary to secure to the state the benefits and to meet the requirements of that Act. The powers provided the Department in RCW 90.48.260 included complete authority to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system.

5. Respondents are the Environmental Protection Agency, an agency of the United States of America, and Robert W. Fri, the Acting Administrator ("the administrator") of the Environmental Protection Agency. As the acting administrator, respondent Fri is charged with the responsibility of administering the Federal Water Pollution Control Act by section 101(d) of the Act; [33 U.S.C. 1251(d)].

III.

STATUTORY PROVISIONS

6. The Federal Water Pollution Control Act Amendments of 1972 [86 Stat. 816 et seq.] [33 U.S.C. 1251 et seq.] were passed by the Congress of the United States and became effective on October 18, 1972.

7. Section 101(a) ((33 U.S.C. 1251(a))) of the Act states that "[t]he objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

8. Section 101(b) ((33 U.S.C. 1251(b))) of the Act states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act."

9. Section 402 (33 U.S.C. 1342) of the Act establishes a National Pollutant Discharge Elimination System (NPDES). The NPDES allows the Administrator to issue permits for the discharge into navigable waters of any pollutant or combination of pollutants, so long as the proposed discharge meets the requirements of the Act. Except in compliance with such a permit, the discharge of any pollutant by any person is made unlawful by section 301 (33 U.S.C. § 1311) of the Act. Section 402 of the Act further provides that each state which desires to administer its own permit system under the NPDES for discharges into navigable waters within its judisdiction may submit to the Administrator a full and complete description of the program which it proposes to administer under state law. Section 402 provides that the Administrator "shall approve each such submitted program" which meets the requirements specified by the Act for such a program.

10. Under section 313 of the Act [33 U.S.C. 1323], each department, agency or instrumentality of the executive, legislative and judicial branches of the federal gov-

ernment which has jurisdiction over any property or facility or is engaged in any activity resulting or which may result in the discharge of pollutants, must comply with federal, state, interstate and local requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements, including the payments of reasonable service charges, unless exempted from these requirements by the President of the United States.

IV.

THE ADMINISTRATOR'S ACTIONS

11. Pursuant to section 304(h)(2) of the Act [33 U.S.C. 1314(h)(2)], the Administrator was required to promulgate guidelines establishing the minimum elements necessary for a state to assume operation of the NPDES within its borders. The Administrator promulgated such guidelines, and caused them to be published at 37 Federal Register 28390 [December 22, 1972] and at 40 Code of Federal Regulations §§ 124.1-124.94.

12. The Administrator further adopted regulations prescribing the policies and procedures to be followed by him in connection with applications for permits issued by the Environmental Protection Agency pursuant to sections 402 and 405 of the act; said regulations being published at Federal Register 13527 and at 40 Code of Federal Regulations § 125. 40 CFR § 125.2 prescribes the policy and procedures to be followed in connection with permits authorizing discharges into navigable waters, the waters of the contiguous zone, and the oceans from any agency or instrumentality of the federal government and from any Indian activity on Indian lands, and further states the regulations of section 125.2 do not prescribe the policy and procedures to be followed in connection with permits by states under programs approved by the Administrator pursuant to section 402(b) of the Act. Such state programs, 40 CFR § 125.2 continues, do not cover agencies and instrumentalities of the federal government and Indian activities on Indian lands under the jurisdiction of the United States.

13. By letter dated June 12, 1973, the Regional Director of Region X of the Environmental Protection Agency, acting on behalf of the respondents, advised the petitioners that the Environmental Protection Agency does not, in relation to the approval of a submittal of a state program by the Governor of the State of Washington, have authority to "delegate permit issuance for federal facilities to any state."

14. After promulgation of the guidelines and regulations described in paragraph 11 and 12, Daniel J. Evans, the Governor of the State of Washington, pursuant to section 402(b) of the Act, submitted to the Regional Director of Region X of the Environmental Protection Agency as representative of the Administrator, on June 21, 1973, a full and complete description of the program which the state proposed to operate within its jurisdiction as part of the NPDES. The description of the program included a provision that discharges of pollutants to navigable waters from federal facilities were covered by the state program.

15. By letter dated July 20, 1973, the Regional Director of Region X of the Environmental Protection Agency, acting on behalf of the respondents, advised the Governor of the State of Washington that the Regional Director had reviewed the description of the program submitted and had determined that it was "missing important components" and by so doing disapproved the Governor's submission as described in paragraph 14. By letters also dated July 20, 1973, issued concurrently with the letter to the Governor, the Regional Director, acting on behalf of the respondents, advised the Director of the Washington State Department of Ecology and the Executive Secretary of the Washington State Thermal Power Plant Site Evaluation Council of the determination that respondents have "sole authority to issue permits to federal facilities" and implicitly determined that respondents are not empowered to approve a state program which includes the authority to issue permits under the NPDES relating to federal facilities.

16. By letter dated July 31, 1973, the Director of the Washington State Department of Ecology advised the

Regional Director of Region X of the Environmental Protection Agency that the Governor of the State of Washington would submit to the Administrator for approval a second full and complete description of the permit program the state proposes to operate within its jurisdiction as a part of the NPDES possibly as early as the end of August, 1973, but no later than the end of September, 1973.

V.

UNLAWFUL ACTS OF THE ADMINISTRATOR

17. The Administrator has, as described in the foregoing paragraphs, unlawfully determined as to a state program submitted to him under section 402(b) of the Act by the Governor of the State of Washington that federal facilities are not subject to any state permit program approved by the administrator as a part of the NPDES.

18. Stated further, the determination of refusal of the Administrator to consider for approval as a part of the program submitted by the Governor, as described in paragraph 15 hereof, pursuant to section 402(b) of the Act, that portion of the submission relating to the applicability thereof to federal facilities which discharge pollutants to waters covered by the NPDES and, implicitly, the determination by the Administrator that he would take the same position in relation to any resubmission by the Governor of the State of Washington in accordance with the intention, described in paragraphs 13 and 15 hereof, violates the provisions of the Act, more particularly sections 402 and 313 thereof.

VI.

INJURY

19. There are approximately fifty federal facilities discharging pollutants into navigable waters of the State of Washington covered by the Act and state law. By the determination to refuse to consider for approval any

NPDES program submission of the applicant containing provisions covering discharges of federal facilities, the Administrator has prevented the State of Washington, acting through its agencies the Department of Ecology and the Thermal Power Plant Site Evaluation Council, from exercising its powers and responsibilities to prevent, reduce, and eliminate pollution as provided by the Federal Water Pollution Control Act as well as by the water pollution control and protection laws of the State of Washington; primarily Chapter 90.48 of the Revised Code of Washington, and thereby limited the power of the State of Washington to control its own destiny by insuring, as best it can, the protection of the quality of navigable waters within its boundaries.

WHEREFORE, appellants request that this Honorable Court:

1. Review the determination of the Administrator, relating to the submission by the Governor of the State of Washington to the Administrator under section 402 (b) as described in paragraph 14 hereof, that the Administrator has no power to grant and will not approve as a part of any state permit program under the NPDES, authority to issue permits pertaining to federal facilities discharging pollutants to waters of the state, and

2. Declare that the Administrator erred and exceeded his authority by refusing to consider for approval that portion of the state permit program described in paragraph 14 or any future state permit program submitted to the Administrator by the Governor of the State of Washington for approval as a part of the NPDES under section 402(b)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition for Review of Agency Action by mailing by first class mail, a copy, postage prepaid, to each of the following:

Environmental Protection Agency
1626 K Street N.W.
Washington, D.C. 20460
Mr. Robert W. Fri, Acting Administrator
U.S. Environmental Protection Agency
1626 K Street N.W.
Washington, D.C. 20460

DATED this 6th day of August, 1973.

/s/ Charles B. Roe, Jr.
Charles B. Roe, Jr.
Senior Assistant Attorney General
State of Washington

[SEAL]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

Nov. 14, 1973

THE ADMINISTRATOR

Dear Governor Evans:

Your request dated September 14, 1973, for approval to conduct a State Permit Program pursuant to the provisions of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Federal Water Pollution Control Act Amendments of 1972 (the "Act") is hereby approved. Accordingly, as of this date I am suspending the issuance of permits by the Environmental Protection Agency under subsection (a) of section 402 of the Act as to all discharges in the State of Washington other than those from agencies and instrumentalities of the Federal Government.

The program that you conduct pursuant to this authority must at all times be in accordance with section 402 of the Act, all guidelines promulgated pursuant to section 304(h)(2) of the Act, and the Memorandum of Agreement between the Regional Administrator of EPA's Region X and the Director of the Washington State Department of Ecology, which I have also approved today.

In addition, this approval is based upon your November 7 letter to Mr. Agee in which you state that modification of Washington's civil and criminal penalties will be recommended to the next regular session of the State legislature "so as to bring the State's laws into the same condition as counterpart Federal laws, both in terms of amount and in nature of conduct subject to such penalties." We feel maximum civil penalties of $10,000 and maximum criminal fines of $25,000 are desirable and necessary to avoid any weak links in the national chain of state permitting programs.

I also note in approving Washington's program today that you have made a commitment to submit amendatory legislation, including appropriate amendments to Chapter 90.48 RCW, to the January, 1975, legislative session in

order to solve inconsistencies between Washington's recently adopted NPDES regulations and earlier statutes. These adjustments should help to avoid unnecessary challenges to Washington's authority to issue and enforce NPDES permits.

I wish to emphasize my concurrence with Washington's goal as set forth in paragraphs 1 and 2 of II. POLICIES on page 2 of your Agreement with Region X, of issuing NPDES permits to all discharges in the State of Washington by December 31, 1974. Because of the severe consequences that could accrue to facilities discharging without an NPDES permit after that date, we urge that every effort be undertaken to ensure that this important commitment is achieved. The Region X staff stands ready to assist you in the writing and issuance of these permits. Washington has already set a good example by issuing more permits during its period of interim permit-issuing authorization than any other state.

I personally am encouraged by the following statements in your November 7 letter to Mr. Agee:

> "The NPDES is the heart of our nation's effort to eliminate the blight of water pollution. Successful implementation of its provisions is imperative. That achievement can come about only if the best efforts of both the state and federal governments are provided. By my submission, the State of Washington is so committed."

Speaking on behalf of the Environmental Protection Agency and its staff, let me assure you that we will do everything possible, including the minimization of time-consuming procedures and paper shuffling, to aid you in your commitment to eliminate the blight of water pollution.

Sincerely yours,

/s/ Russell E. Train
Russell E. Train

Honorable Daniel J. Evans
Governor of Washington
Olympia, Washington 98504

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1189

[Filed Feb. 4, 1974, ————————, Clerk,
U.S. Court of Appeals]

[Received Feb. 4, 1974, ————————, Clerk,
U.S. Court of Appeals]

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY,
PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES OF AMERICA, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS.

APPLICATION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)]

SLADE GORTON
Attorney General of the
State of Washington

CHARLES B. ROE, JR.
Senior Assistant Attorney
General

CHARLES W. LEAN
Assistant Attorney General

WICK DUFFORD
Assistant Attorney General
Attorneys for Petitioners
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-2354

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.

STATE OF WASHINGTON and its DEPARTMENT OF ECOLOGY, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES OF AMERICA, and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, United States of America, RESPONDENTS.

APPLICATION FOR REVIEW OF AGENCY ACTION
[33 U.S.C. § 1369(b)]

The State of Washington and its Department of Ecology hereby petition the court for review of the order of the Environmental Protection Agency of the United States of America, by its Administrator, Russell E. Train, respondents herein, dated November 14, 1973. Said order, in the form of a letter from Russell E. Train to Daniel J. Evans, Governor of the State of Washington, approved, with conditions, the program submitted to the respondents by Governor Evans, dated September 14, 1973, pursuant to 33 U.S.C. 1342(b).

The petitioners request the court to set aside that portion of the order of approval of the respondents which excludes federal facilities located in the State of Wash-

ington from the program submitted by the Governor of the State of Washington.

DATED this 30th day of January, 1974.

SLADE GORTON
Attorney General

/s/ Charles B. Roe, Jr.
CHARLES B. ROE, JR.
Senior Assistant Attorney General

/s/ Charles W. Lean
CHARLES W. LEAN
Assistant Attorney General
WICK DUFFORD
Assistant Attorney General
Attorneys for Petitioners

Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-2354

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by mailing by first class mail, a copy, postage prepaid, to each of the following:

Mr. Russell E. Train, Administrator
U.S. Environmental Protection Agency
Waterside Mall, 4th and M Street S.W.
Washington, D.C. 20460

Mr. James L. Agee, Regional Administrator
Environmental Protection Agency
Region X
1200 Sixth Avenue
Seattle, Washington 98101

DATED this 31st day of January, 1974.

/s/ Charles B. Roe, Jr.
CHARLES B. ROE, JR.
Senior Assistant Attorney General
State of Washington

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

EVELLE J. YOUNGER
Attorney General

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

RICHARD C. JACOBS
Deputy Attorney General
6000 State Building
San Francisco, California
Telephone: (415) 557-0285
Attorneys for State of California

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

Petitioner, PEOPLE OF THE STATE OF CALIFORNIA respectfully moves this Court to augment the record in this proceeding, to include the affidavit of BILL B. DENDY, Executive Director of the State Water Resources Control Board. The grounds for this motion are set forth in the attached affidavit of RICHARD C. JACOBS, Deputy Attorney General of the State of California.

DATED: March 19, 1974

EVELLE J. YOUNGER
Attorney General
CARL BORONKAY
Assistant Attorney General
RODERICK WALSTON
Deputy Attorney General

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

ORDER GRANTING MOTION TO AUGMENT RECORD

Good cause appearing, it is hereby ordered that petitioner's Motion to Augment the Record is hereby granted.

DATED:

_____
Circuit Judge

AFFIDAVIT

No. 73/2466

STATE OF CALIFORNIA

v.

E.P.A.

I, RICHARD C. JACOBS, being first duly sworn, hereby state and declare as follows:

I am a Deputy Attorney General for the State of California, and an attorney for the petitioner herein.

In their reply brief, respondents have argued that section 313 of the Federal Water Pollution Control Act Amendments of 1972 requires federal agencies and installations to comply with state "substantive" laws, but does not require similar compliance with state "procedural" requirements including obtaining of state issued permits under the National Pollutant Discharge Elimination System. In our brief, filed herewith, we have argued that in fact substantive water quality standards under California law are developed only through an administrative hearing process leading to the issuance of waste discharge requirements. We have also argued that the position of respondents would result in the issuance of permits by the Administrator to federal agencies, with different standards and conditions than if the same permits were issued by the State of California. We have further contended that such a result is inconsistent with the language of section 313 that federal agencies comply with state "requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements. . ."

The affidavit of BILL B. DENDY, the subject of petitioner's motion to augment the record, states that on two separate occasions, the Administrator of the Environmental Protection Agency has issued permits to federal facilities, but has failed to include therein con-

ditions requested by the State Water Resources Control Board and a regional board. The affidavit is therefore offered to show that the actual practice of the Administrator under the National Pollutant Discharge Elimination System underscores the validity of petitioner's position herein.

The Dendy affidavit further briefly states the actions of federal agencies and the State Board with respect to various water appropriative permits issued to the United States Bureau of Reclamation. The affidavit is accordingly also offered to show further acts of the federal government and State Board with respect to federal compliance with state law, other than National Pollutant Discharge Elimination System permits.

Executed under penalty of perjury on March 19, 1973, in San Francisco, California.

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 73-2466
73-2486

PEOPLE OF THE STATE OF CALIFORNIA et rel.
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and ROBERT W. FRI, as ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

AFFIDAVIT OF BILL B. DENDY

I, Bill B. Dendy, being first duly sworn, hereby state and declare as follows:

I am the Executive Officer of the State Water Resources Control Board. I have held this position since March 1, 1972. Under the general direction and control of the Board, I exercise supervision of the functions of the Board and plan, organize, direct and coordinate the activities of the staff of the Board.

Pursuant to California law, specifically the Dickey Act adopted in 1949 and the Porter-Cologne Water Quality Control Act adopted in 1969, federal agencies have applied to California's regional water quality control boards for requirements applicable to specific waste discharges from federal installations. Applications for requirements have been filed by the army base at Fort Ord and twenty-nine other federal facilities in the San Francisco Bay area. Some federal agencies, such as the U.S. Air Force and the U.S. Department of Commerce, have paid the filing fees required by state law. Pursuant to these applications for requirements, the regional boards have conducted administrative proceedings, which were participated in by the appropriate federal agency, and have issued requirements applicable to the specific discharge.

On two recent occasions where the Administrator of the Federal Environmental Protection Agency (Administrator) has issued permits for the discharge of pollutants from federal facilities to waters of the State, the Administrator has refused to include conditions in the permit as requested by the State Board and a regional water quality control board and has instead inserted his own conditions in the permits. Specifically, the Administrator issued permit No. CA 0002071 on September 30, 1973 to the U.S. Air Force—Norton Air Force Base—for a discharge of storm runoff from airplane parking areas. The recommendations of the State Board and the California Regional Water Quality Control Board, Santa Ana Region, were not incorporated into the permit. On December 31, 1973 the Administrator issued permit No. CA 0002062 to the U.S. Air Force—Norton Air Force Base—for a discharge of 0.11 million gallons per day of industrial waste water. The Administrator failed to include a limit on total dissolved solids as requested by the State Board.

On July 28, 1971, the State Water Resources Control Board adopted Decision 1379, and thereby imposed various conditions, limitations and restrictions upon water appropriation permits previously issued to the U.S. Bureau of Reclamation. Such permits allowed the U.S. Bureau of Reclamation to divert water from the Sacramento-San Joaquin Delta for use in various federal reclamation projects in California. The authorization to divert water was contained in permits issued in response to applications submitted by the United States. Conditions were attached to the permits which required the United States to release water from storage and discontinue diversions when necessary to achieve certain water quality standards in the Delta (set forth in Decision 1379 as the "Delta Standards"), which standards are designed to prevent the intrusion of salinity in the Delta.

In issuing water appropriation permits, the State Water Resources Control Board is required, under California Water Code Section 1253, 1255 and 1257, to consider the "public interest". The Board is also required to comply with the provisions set forth in the

California Environmental Quality Act, found in Section 2100 et seq. of the California Public Resources Code.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 1974, at Sacramento, California.

/s/ Bill B. Dendy
Bill B. Dendy
Executive Officer

Subscribed and sworn to before me this 5th day of March, 1974.

/s/ Gail F. Draper
GAIL F. DRAPER
Notary Public, Sacramento County, Calif.

[SEAL]

GAIL F. DRAPER
Notary Public
Sacramento County, California
My Commission Expires Apr. 15, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

JOANIE MITCHELL, being first duly sworn, on oath deposes and states:

I am a citizen of the United States, over 18 years of age and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102; I served a copy of the attached MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW on the following by placing same in an envelope (or envelopes) addressed (respectively) as follows:

MR. CHARLES ROE
Office of the Attorney General
Temple of Justice
Olympia, Washington 98501
MR. RAYMOND W. MUSHAL
Attorney
Department of Justice
Washington, D.C. 20530

Each said envelope was then, on March 19, 1974, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/ Joanie Mitchell
Affiant

Subscribed and sworn to before me this —— day of _____, 19 ——.

_____
Notary Public in and for said
County and State

11-71 SF 2

UNITED STATES COURT OF APPEALS
THE NINTH CIRCUIT

No. 73-2466

[Filed May 23, 1974, ————————————, Clerk,
U.S. Court of Appeals]

PEOPLE OF THE STATE OF CALIFORNIA, ex rel.
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

vs.

ENVIRONMENTAL PROTECTION AGENCY, and
ROBERT W. FRI, Acting Administrator, RESPONDENTS

Before: DUNIWAY and CHOY, Circuit Judges

ORDER

Petitioner's motion to augment the record in this matter with the affidavit of BILL B. DENDY is granted.

/s/ Ben C. Duniway

/s/ Herbert Y. C. Choy
U.S. Circuit Judges

MoCal 5/20/74

ATTORNEY GENERAL — OFFICE COPY
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Aug. 15, 1974, ————————————, Clerk,
U.S. Court of Appeals]

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.*
STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

EVELLE J. YOUNGER
Attorney General

CARL BORONKAY
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General
RICHARD C. JACOBS
Deputy Attorney General
6000 State Building
San Francisco, California
Telephone: (415) 557-0285
Attorneys for State of California

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2466

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.*
STATE WATER RESOURCES CONTROL BOARD, PETITIONERS

v.

THE ENVIRONMENTAL PROTECTION AGENCY and RUSSELL E. TRAIN, as Administrator of the Environmental Protection Agency, RESPONDENTS

MOTION TO AUGMENT RECORD ON PETITION FOR REVIEW

Petitioner, PEOPLE OF THE STATE OF CALIFORNIA, respectfully moves this Court to augment the record in this proceeding, to include the affidavit of BILL B. DENDY, Executive Director of the State Water Resources Control Board. The grounds for this motion are set forth in the attached affidavit of RICHARD C. JACOBS, Deputy Attorney General of the State of California.

DATED: August 15, 1974.

EVELLE J. YOUNGER
Attorney General
CARL BORONKAY
Assistant Attorney General
RODERICK WALSTON
Deputy Attorney General

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

ORDER GRANTING MOTION TO AUGMENT RECORD

Good cause appearing, it is hereby ordered that petitioner's Motion to Augment the Record is hereby granted.

DATED:

_____
Circuit Judge

AFFIDAVIT

No. 73-2466

STATE OF CALIFORNIA

v.

E.P.A.

I, RICHARD C. JACOBS, being first duly sworn, hereby state and declare as follows:

I am a Deputy Attorney General for the State of California, and an attorney for the petitioner herein.

In their reply brief, respondents have argued that section 313 of the Federal Water Pollution Control Act Amendments of 1972 requires federal agencies and installations to comply with state "substantive" laws, but does not require similar compliance with state "procedural" requirements including obtaining of state issued permits under the National Pollutant Discharge Elimination System. In our briefs we have argued that in fact substantive water quality standards under California law are developed only through an administrative hearing process leading to the issuance of permits and waste discharge requirements. We have also argued that the position of the respondents would result in the issuance of permits by the Administrator to federal agencies, with different standards and conditions than if the same permits were issued by the State of California. We have further contended that such a result is inconsistent with the language of section 313 that federal agencies comply with state "requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements . . ."

The affidavit of BILL B. DENDY, the subject of petitioner's motion to augment the record, states that the Administrator of the Environmental Protection Agency has recently issued a permit to the U.S. Air Force Point Arena Radar Station for the discharge of pollutants to the Garcia River, after being advised by the North Coast

Regional Water Quality Control Board that the Interim Basin Plan for the North Coast Region prohibited such a discharge, and that waste discharge requirements previously adopted by the North Coast Board for the Station prohibited any such discharge. The affidavit is therefore offered to show that the actual practice of the Administrator under the National Pollutant Discharge Elimination System results in standards for federal agencies different than those which would have been imposed by the State of California, and thereby the validity of petitioner's position herein.

The Court has previously granted petitioner's motion to augment the record with a similar affidavit.

Executed under penalty of perjury on August 15, 1974, in San Francisco, California.

/s/ Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 73-2466, 73-2486

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL TRAIN AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

AFFIDAVIT OF BILL B. DENDY

I, Bill B. Dendy, being first duly sworn, hereby state and declare as follows:

I am the Executive Officer of the State Water Resources Control Board. I have held this position since March 1, 1972. Under the general direction and control of the Board, I exercise supervision of the functions of the Board, and plan, organize, direct, and coordinate the activities of the staff of the Board.

Pursuant to California law, specifically the Dickey Act adopted in 1949 and the Porter-Cologne Water Quality Control Act adopted in 1969, federal agencies have applied to California's regional water quality control boards for requirements applicable to specific waste discharges from federal installations. Applications for requirements have been filed by the army base at Fort Ord and twenty-nine other federal facilities in the San Francisco Bay area. Some federal agencies, such as the U.S. Air Force and the U.S. Department of Commerce, have paid the filing fees required by state law. Pursuant to these applications for requirements, the regional boards have conducted administrative proceedings, which were participated in by the appropriate federal agency, and have issued requirements applicable to the specific discharge.

Recently, the Administrator of the Federal Environmental Protection Agency (Administrator) issued a permit for the discharge of pollutants from the United States Air Force Point Arena Radar Station to the watrs of the State. The Administrator has refused to include conditions in the permit as requested by a California regional water quality control board and has instead inserted his own conditions in the permits. Specifically, the Administrator issued permit No. CA 0110418 on May 14, 1974, to the U.S. Air Force Point Arena Radar Station for a discharge of treated domestic wastewater, swimming pool backwash water and filter backwash from the water supply pumping station to the Garcia River. The recommendations of the California Regional Water Quality Control Board, North Coast Region, were not incorporated into the permit." On March 1, 1974, the Regional Board informed the Administrator that:

> "We believe that the issuance of a permit for the Point Arena Air Force Station is unwarranted for the following reasons:
>
> 1. The facility does not discharge to surface waters.
> 2. The Interim Basin Plan for this Region does not permit a discharge to coastal streams. The Garcia River is considered a coastal stream.
> 3. Order No. 73-10, Waste Discharge Requirements for the Point Arena Air Force Station, which were adopted by the Regional Board on January 24, 1973, prohibit the discharge of waste to the Garcia River and it's tributaries."

I certify under penalty of perjury that the foregoing is true and correct.

Executed on August 12, 1974, at Sacramento, California.

/s/ Bill B. Dendy
BILL B. DENDY
Executive Director

Subscribed and sworn to before me this 12th day of August, 1974.

/s/ Gail F. Draper
Notary Public in and for the
County of Sacramento,
State of California

[SEAL]

GAIL F. DRAPER
Notary Public
Sacramento County, California
My Commission Expires Apr. 15, 1977

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

JOANIE MITCHELL, being first duly sworn, on oath deposes and states:

I am a citizen of the United States, over 18 years of age and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102; I served a copy of the attached Motion to Augment Record on Petition For Review on the following by placing same in an envelope (or envelopes) addressed (respectively) as follows:

MR. CHARLES ROE
Office of the Attorney General
Temple of Justice
Olympia, Washington 98501

MR. RAYMOND N. MUSHAL
Attorney
Department of Justice
Washington, D.C. 20503

Each said envelope was then, on August 15, 1974, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/ Joanie Mitchell
Affiant

Subscribed and sworn to before me this 19th day of August, 1974.

/s/ Florence E. Crozier
Notary Public in and for said
County and State

[SEAL]

FLORENCE E. CROZIER
Notary Public—California
County of San Francisco
My commission expires Mar. 1, 1978

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2466

[Filed Aug. 22, 1974, Emil E. Melfi, Jr., Clerk,
U.S. Court of Appeals]

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD, PETITIONER

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL TRAIN AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

ORDER GRANTING MOTION TO
AUGMENT RECORD

Good cause appearing, it is hereby ordered that petitioner's Motion to Augment the Record is hereby granted.

DATED:

/s/ Eugene A. Wright
Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
PETITIONERS

v.

CALIFORNIA ex rel. STATE WATER RESOURCES
CONTROL BOARD, et al.

ORDER ALLOWING CERTIORARI. Filed June 23, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is set for oral argument in tandem with No. 74-220, Hancock v. Train.

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